

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: SPB 7120

INTRODUCER: For consideration by the Regulated Industries Committee

SUBJECT: Malt Beverages

DATE: March 26, 2014

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Oxamendi</u>	<u>Imhof</u>	_____	Submitted as Committee Bill

I. Summary:

SPB 7120 defines the term “growler” to mean a clean container made of glass, ceramic, metal, or similar leak-proof material having a capacity of 32 ounces, 64 ounces, or 128 ounces that is filled with a malt beverage and sealed on the premises at or immediately before or after the time of sale in response to an order in a face-to-face transaction.

The bill provides the restrictions and permitted practices for malt beverage manufacturers that are also licensed as a vendor (vendor-licensed brewers). It permits vendor-licensed brewers to sell growlers to consumers for off-premises consumption with malt beverages that are brewed on the licensed premises by the vendor-licensed brewer. Growlers may only be filled or refilled with malt beverages that are manufactured on the licensed premises. A vendor-licensed brewer may sell malt beverages that it manufactures at another location or that are manufactured by another brewer as authorized by its vendor’s license. However, the malt beverages that are manufactured at another location and that are sold for consumption off the premises must be obtained from a licensed distributor and sold to the consumer in their original sealed containers.

The bill does not prohibit the sale of malt beverages that the manufacturer obtains from a licensed distributor. It prohibits deliveries of growlers off a licensed premises. It provides that the vendor-licensed brewer is responsible for the reporting and payment of excise taxes.

The bill prohibits brew pubs from filling growlers, shipping malt beverages between licensed premises owned by the licensee, and selling or distributing malt beverages outside the licensed premises.

The bill provides a statement of Legislative intent vendor-licensed brewer and brew pub licenses constitute limited exceptions to the manufacturing and vendor licensing requirements of the Beverage Law. It also provides that anything not specifically authorized in ss. 561.221(2) and (3), F.S., is prohibited unless otherwise authorized under the Beverage Law.

The bill decreases the maximum amount of the bond required for breweries from \$20,000 to \$5,000. It also decreases the minimum amount of the bond that the division may accept in its discretion from \$10,000 to \$2,500.

The bill limits the filling or refilling of growlers to vendor-licensed brewers with malt beverages that are brewed on the licensed premises, vendors with a quota license to sell alcoholic beverage only in sealed containers for consumption off the premises, and vendors licensed for consumption of malt beverages on the licensed premises, unless the license restricts the consumption of malt beverages to consumption on the premises only.

The bill limits the sale of growlers by vendor-licensed brewers to sales for consumption off the premises and requires that the sales must be conducted in face-to-face transactions.

A growler must have an unbroken seal, or its contents must be incapable of being immediately consumed. A growler must be clearly labeled as containing an alcoholic beverage, provide the name of the manufacturer, the brand, the volume, the percentage of alcohol by volume, and provide the required federal health warning notice for alcoholic beverages. A growler with a preexisting label or other identifying mark of a manufacturer or brand must be covered sufficiently to indicate the manufacturer and brand of the malt beverage being placed in the container at that refilling. The growler must be clean before being filled or refilled.

The bill provides a severability clause.

The bill provides an effective date of July 1, 2014.

II. Present Situation:

In Florida, alcoholic beverages are regulated by the Beverage Law,¹ which regulates the manufacture, distribution, and sale of wine, beer, and liquor via manufacturers, distributors, and vendors.² The Division of Alcoholic Beverage and Tobacco (division) within the Department of Business and Professional Regulation (department) administers and enforces the Beverage Law.³

Three Tier System

In the United States, the regulation of alcohol has traditionally been through what is termed the “three-tier system.” The system requires that the manufacture, distribution, and sale of alcoholic beverages be separated. Retailers must buy their products from distributors who in turn buy their products from the manufacturers. Manufacturers cannot sell directly to retailers or directly to consumers. The system is deeply rooted in the perceived evils of the “tied house” in which a bar is owned or operated by a manufacturer or the manufacturer exercises undue influence over the retail vendor.⁴

¹ The Beverage Law means chs. 561, 562, 563, 564, 565, 567, and 568, F.S. *See* s. 561.01(6), F.S.

² *See* s. 561.14, F.S.

³ Section 561.02, F.S.

⁴ Erik D. Price, *Time to Untie the House? Revisiting the Historical Justifications of Washington’s Three-Tier System Challenged by Costco v. Washington State Liquor Control Board*, a copy can be found at: http://www.lanepowell.com/wp-content/uploads/2009/04/pricee_001.pdf (Last visited March 22, 2014).

In the three-tier system, each license classification has clearly delineated functions. For example, in Florida, distributors are licensed to sell and distribute alcoholic beverages at wholesale to persons who are licensed to sell alcoholic beverages at retail.⁵ Only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail.⁶ Vendors are limited to purchasing their alcoholic beverage inventory from licensed distributors, manufacturer, or bottler.⁷ Licensing manufacturers, distributors, and registered exporters are prohibited from being licensed as vendors.⁸ In addition from being prohibited from having an interest in a vendor, manufacturers are also prohibited from distributing directly to a vendor other than to a vendor licensed under s. 561.221(2), F.S.⁹ However, a manufacturer of wine may be licensed as a distributor.¹⁰

There are some exceptions to this regulatory system. The exceptions include allowing beer brew pubs to manufacture malt beverages and to sell them to consumers,¹¹ allowing individuals to bring small quantities of alcohol back from trips out-of-state,¹² and allowing in-state wineries to manufacture and sell directly to consumers.¹³

There are two license options that permit vendors to manufacture malt beverages for sale directly to consumers. Section 561.221(2), F.S., permits a vendor to be a manufacturer of malt beverages, even if the vendor is also licensed as a distributor. The malt beverages the vendor manufactures must be sold on property consisting of a single complex that includes a brewery and other structures that promote the brewery and the tourist industry of the state. The property may be divided by no more than one public street or highway. This type of license does not limit the amount of malt beverages that may be manufactured. It also does not limit the type of vendor license that the manufacturer may obtain, e.g., a license to sell beer, wine and liquor and licenses that permit package sales of other alcoholic beverage.

Section 561.221(3), F.S., permits a vendor also to be licensed as a manufacturer of malt beverages if the vendor is engaged in brewing malt beverages at a single location in an amount that does not exceed 10,000 kegs per year.¹⁴ The malt beverages must be sold to consumers for consumption on the vendor's licensed premises or on contiguous licensed premises owned by the vendor. These vendors are known in the industry as "brew pubs."

Section 561.20, F.S., limits, per county, the number of alcoholic beverage licenses that may be issued that permit the sale of liquor along with beer and wine. Section 561.20, F.S., limits the

⁵ Section 561.14(2), F.S.

⁶ Section 561.14(3), F.S. However, see discussion regarding the exception provided in s. 561.221, F.S.

⁷ Section 561.14(3), F.S. Vendors may buy from vendors in a pool buying group if the initial purchase was by a single purchase by a pool buying agent.

⁸ Section 561.22, F.S.

⁹ Section 563.022(14), F.S.

¹⁰ Section 561.221(1)(a), F.S.

¹¹ See s. 561.221(2), F.S., which permits the limited manufacture of beer by vendors (brew pubs).

¹² See s. 562.16, F.S., which permits the possession of less than one gallon of untaxed alcoholic beverages when purchased by the possessor out-of-state in accordance with the laws of the state where purchased and brought into the state by the possessor.

¹³ See s. 561.221, F.S.

¹⁴ Section 561.221(3)(a)1., F.S., defines the term "keg" as 15.5 gallons.

number of licenses in a county to one license per 7,500 residents within the county. These limited alcoholic beverage licenses are known as “quota” licenses. New quota licenses are created and issued when there is an increase in the population of a county. The licenses can also be issued when a county initially changes from a county which does not permit the sale of intoxicating liquor to one that does permit their sale. The quota license is the only alcoholic beverage license that is limited in number; all other types of alcoholic beverage licenses are available without limitation.

Section 565.02(a)-(f), F.S., prescribes the license taxes for vendors who are permitted to sell any alcoholic beverages, including beer, wine and distilled spirits, regardless of alcoholic content. This includes licensees who are authorized to sell:

- Any alcoholic beverages, where the sale is limited to consumption on the premises;
- Any alcoholic beverages for consumption on premises where off-premises sales are permitted, and
- Any alcoholic beverages, where the beverages are sold only in sealed containers for consumption off the premises.

On-Premises or Off-Premises Consumption-Malt Beverages

Section 564.02, F.S., distinguishes between places of business where a vendor is licensed to only sell malt beverages for on-premises consumption¹⁵ and places of business where such on-premises consumption is permitted.¹⁶ According to the department, vendors licensed to sell malt beverages for on-premises consumption can also sell alcoholic beverages in sealed containers for the customer to take away from the licensed premises for off-premises consumption. Vendors licensed to sell malt beverages for consumption “only” on the licensed premises are not permitted to sell alcoholic beverages for off-premises consumption. The license fee for a license that does not permit the sale of alcoholic beverage in sealed containers for off-premises consumption is 50 percent less than the license fee for a license that permits the sale of sealed containers for off-premises consumption.¹⁷

According to alcoholic beverage industry representatives and a representative for the division, vendors with on-premises licenses routinely fill containers with a malt beverage and seal them for customers to take off-premises for later consumption. They note that current law does not prohibit this practice. The vendors typically seal the beverage container before the consumer leaves the premises so that the consumer will not violate any local ordinances that prohibit the carrying in public of open containers of alcoholic beverages or the state-law prohibition against the possession of open containers of alcoholic beverages in vehicles.¹⁸ The beverage law does not define the term “sealed container.”

In 1995, the department repealed a rule which explicitly stated that an on-premises malt beverage licensee could sell malt beverages, for consumption off-premises, in “sealed containers” and

¹⁵ See s. 563.02(1)(a), F.S.

¹⁶ See ss. 563.02(1)(b)-(f) and 565.045, F.S.

¹⁷ See s. 563.02(1)(a), F.S.

¹⁸ Section 316.1936, F.S.

could also sell wine and distilled spirits in the “original sealed containers as received from the distributor.”¹⁹

Malt Beverage Containers

Section 563.06(6), F.S., requires that all malt beverages that are offered for sale by vendors must be packaged in individual containers containing no more than 32 ounces (one quart). However, malt beverages may be packaged in bulk, kegs, barrels, or in any individual container containing one gallon or more of malt beverage regardless of individual container type.

Prior to 2001, s. 563.06(6), F.S., provided that malt beverages could be sold by vendors only in 8, 12, 16, or 32 ounce individual containers. Chapter 2001-78, L.O.F., amended that section to allow vendors to sell malt beverages in individual containers of “no more than 32 ounces.”²⁰ The current provision that allows containers of one gallon or more was unaffected by that amendment.

Growlers

Some states permit vendors to sell malt beverages in containers known as “growlers,”²¹ which typically are reusable containers of between 32 ounces and one gallon that the consumer can fill with the vendor’s malt beverage for consumption off the licensed premises. According to a representative for several vendors who manufacture malt beverages,²² the national standard size for a growler is 64 ounces. Florida law does not permit the use of a 64 ounce growler.

Tied House Evil Prohibitions

Section 561.42(1), F.S., prohibits a licensed manufacturer or distributor from assisting any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. Specifically, s. 561.42(1), F.S., provides in part:

No licensed manufacturer or distributor of any of the beverages herein referred to shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law; nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such licensed manufacturer or distributor; provided, however, that this does not apply

¹⁹ Rule 7A-1.008, F.A.C., as amended on March 10, 1985. This rule was subsequently transferred to rule 61A-1.008, F.A.C., and then repealed on July 5, 1995.

²⁰ See also *Review of the Malt Beverage Container Size Restrictions*, Interim Report No. 2000-65, Florida Senate Committee on Regulated Industries, September 1999.

²¹ The term “growlers” is derived from the late 1800s and early 1900s practice in which fresh beer was carried from the local pub to one’s home by means of a small-galvanized pail. When the beer sloshed around the pail, it created a rumbling sound as the carbon dioxide escaped through the lid. See “*The Growler: Beer-to-Go!*,” *Beer Advocate* (July 31, 2002). A copy of the article is available at: <http://beeradvocate.com/articles/384> (Last visited January 13, 2014).

²² According to several representatives for vendors who manufacture malt beverages and sell 32-ounce growlers, the vendors are typically licensed under s. 561.221(2), F.S.

to any bottles, barrels, or other containers necessary for the legitimate transportation of such beverages or to advertising materials and does not apply to the extension of credit, for liquors sold, made strictly in compliance with the provisions of this section. (Emphasis supplied.)

Section 561.42(8), F.S., authorizes the division to establish rules and require reports to enforce limitation on credits and other forms of assistance. This rulemaking authority does not extend to cash deposits on beer sales, as provided in s. 563.08, F.S.

Section 561.42, F.S., defines the types of items or services that may be provided to vendors. For example, s. 561.42(10), F.S., prohibits manufacturers, distributors, importers, primary American sources of supply,²³ or brand owners or registrants, or their brokers, sales agents or sales persons, from directly or indirectly giving, lending, renting, selling, or in any other manner furnishing to a vendor any outside sign, printed, painted, electric, or otherwise.

Bond for Payment of Taxes

Section 561.37, F.S., requires that each manufacturer and distributor must file with the division a \$25,000 surety bond acceptable to the division as surety for the payment of all taxes. However, brewers are required to have a bond of \$20,000. At the division's discretion, the division can approve a bond of less than \$20,000 if the amount of business done by the brewer is of a volume that a bond of less than \$20,000 would be adequate to secure the payment of all taxes assessed or authorized by the Beverage Law. The division may not assess or accept a bond of less than \$10,000. The division may in its discretion require that any bond in an amount less than \$20,000 be increased to an amount not to exceed \$20,000.

III. Effect of Proposed Changes:

“Growler” Defined

The bill creates s. 561.01(22), F.S., to define the term “growler.” It defines the term as a clean container made of glass, ceramic, metal, or similar leak-proof material having a capacity of 32 ounces, 64 ounces, or 128 ounces. It also defines the growler as filled with a malt beverage and sealed on the premises at or immediately before or after the time of sale in response to an order in a face-to-face transaction.

Growler Sales by Vendor-Licensed Brewers

The bill amends s. 561.221(2), F.S., to provide the restrictions and permitted practices for malt beverage manufacturers that are also licensed as a vendor (vendor-licensed brewers). It clarifies

²³ Section 564.045(1), F.S., defines the term “primary American source of supply” as the: manufacturer, vintner, winery, or bottler, or their legally authorized exclusive agent, who, if the product cannot be secured directly from the manufacturer by an American distributor, is the source closest to the manufacturer in the channel of commerce from whom the product can be secured by an American distributor, or who, if the product can be secured directly from the manufacturer by an American distributor, is the manufacturer. It shall also include any applicant who directly purchases vinous beverages from a manufacturer, vintner, winery, or bottler who represents that there is no primary American source of supply for the brand and such applicant must petition the division for approval of licensure.

that the exemption for vendor-licensed brewers in s. 561.221(2), F.S., is notwithstanding the prohibitions in ss. 561.22 and 561.42, F.S., or any other provision in the beverage law.

Section 561.221(2)(a), F.S., permits vendor-licensed brewers to sell growlers to consumers for off-premises consumption filled or refilled with malt beverages that are brewed on the licensed premises pursuant to the requirements in s. 563.061, F.S. Growlers must be sold directly to consumers in face-to-face transactions.

A vendor-licensed brewer may sell malt beverages that are manufactured at another location, including another licensed manufacturing premises directly or indirectly owned in whole or in part by the manufacturer, as authorized by its vendor's license. However, the malt beverages that are manufactured at another location and that are sold for consumption off the premises must be obtained from a licensed distributor and sold to the consumer in their original sealed containers.

Section 561.221(2)(a), F.S., also permits a vendor-licensed brewer to sell other alcoholic beverages for on-premises or off-premises consumption, as authorized under its vendor's license, provided that such beverages are obtained from a licensed distributor.

Section 561.221(2)(b), F.S., prohibits vendor-licensed brewers from delivering sealed containers or growlers off a licensed premises, including deliveries by common or premises carrier, privately owned vehicles or other conveyance. It also prohibits consumers or other persons from arranging the delivery of any sealed container or growler off the licensed premises. It explicitly provides that the subsection does not prohibit a consumer from taking a purchased sealed container or growler to another location by a privately owned vehicle or other conveyance.

Section 561.221(2)(c), F.S., provides that the vendor-licensed brewer is responsible for the applicable reports pursuant to ss. 561.50 and 561.55, F.S.,²⁴ with respect to the amount of malt beverages sold or given to consumers on the licensed premises each month. It requires that they pay the applicable excise taxes to the division by the 10th day of each month for the previous month.

Section 561.221(2)(d), F.S., provides that this subsection does not preclude a vendor-licensed brewer from also holding a permanent food service license at the licensed premises.

Section 561.221(2)(d), F.S., provides that the exception for vendor-licensed brewers in this subsection is a limited exception to ss. 561.42 and 561.22, F.S. It also provides that, except as specifically provided in this subsection to permit a manufacturer of malt beverages to also be licensed as a vendor, a manufacturer of malt beverages is subject to the restrictions in ss. 561.42 and 561.22, F.S.

²⁴ Section 561.50, F.S., requires manufacturers and distributors to compute and submit applicable excise tax on alcoholic beverage along with the report required by s. 561.55, F.S., to the division each month, on or before the 10th of each month, for all beverages sold during the previous calendar month.

Brew Pubs

The bill amends s. 561.221(3), F.S., to define the restriction and permitted practices for brew pubs. It clarifies that the exemption for brew pubs in s. 561.221(3), F.S., is notwithstanding the prohibitions in ss. 561.22 and 561.42, F.S., or any other provision in the beverage law.

Section 561.221(3)(a)3., F.S., requires that brew pubs must hold a permanent food service license.

Section 561.221(3)(b), F.S., specifies the types of alcoholic beverage that brew pubs may sell and requires that such sales must be in face-to-face transactions with consumers. Brew pubs may only sell the following alcoholic beverages:

- Malt beverages manufactured on the licensed premises;
- Malt beverages manufactured by other brewers for on-premises consumption as authorized by its vendor's license; and
- Wine or liquor for on-premises consumption as authorized by its vendor's license.

Section 561.221(3)(c), F.S., prohibits brew pubs from shipping malt beverages between licensed premises owned by the licensee. It also prohibits the sale or distribution of malt beverages outside the licensed premises, i.e., a brew pub could not sell growlers. It also clarifies that a brew pub is not a manufacturer for the purposes of s. 563.022(14), F.S., which prohibits malt beverage manufacturers from having an interest in the vendor.

Section 561.221(3)(g), F.S., provides that a term "licensee," as used in this subsection, means a vendor licensed as a manufacturer of malt beverages pursuant to the section.

Legislative Intent Statement

Section 561.221(4), F.S., provides a statement of Legislative intent regarding the vendor and manufacturer licenses authorized under ss. 561.221(2) and (3), F.S. It provides that these licenses constitute limited exceptions to the manufacturing and vendor licensing requirements of the Beverage Law.

Section 561.221(4), F.S., also provides that anything not specifically authorized in subsections (2) and (3) is prohibited unless otherwise authorized under the Beverage Law. The effect or intent of this provision is unclear.

Bond for Payment of Taxes

The bill amends s. 561.37, F.S., to decrease the maximum amount of the bond required for breweries from \$20,000 to \$5,000. It also decreases the minimum amount of the bond that the division may accept in its discretion from \$10,000 to \$2,500.

Conforming Provisions

The bill amends the following provisions to incorporate ss. 561.221(2) and (3), F.S.:

- Section 561.5101(1), F.S., to exempt malt beverages manufactured under ss. 561.221(2) and (3), F.S., from the requirement that malt beverages must come to rest at the licensed premises of an alcoholic beverage wholesaler (distributor) for purposes of inspection and tax-revenue control;
- Section 562.34(1), F.S., to clarify that the prohibition against the possession of containers of alcoholic beverages in this subsection does not apply to person in possession of a growler; and
- Section 563.06(6), F.S., to exempt malt beverages sold in growlers pursuant to s. 563.061, F.S., from the requirement that all malt beverages that are offered for sale by vendors must be packaged in individual containers containing no more than 32 ounces.

The bill also reenacts s. 563.022, F.S., to incorporate the amendments made to s. 561.221(2), F.S.

Additional Limitations on Growler Sales

The bill creates s. 563.061(1), F.S., to limit the filling or refilling of growlers to the following licensees:

- Vendor-licensed brewers licensed pursuant to s. 561.221(2), F.S.;
- Vendors holding a quota license under ss. 561.20(1) and 565.02(1)(a), F.S., i.e., vendors licensed to sell alcoholic beverage only in sealed containers for consumption off the premises; and
- A vendor holding a license under s. 563.02(1)(b)-(f), s. 564.02(1)(b)-(f), or s. 565.02(1)(b)-(f), F.S., which authorize consumption of malt beverages on the premises, unless such license restricts the consumption of malt beverages to the premises only.

The bill limits the sale of growlers by these licensees to sales for consumption off the premises and requires that the sales must be conducted in face-to-face transactions.

Section 563.061(2), F.S., requires that the growler must have an unbroken seal, or that its contents must be incapable of being immediately consumed.

Section 563.06(3), F.S., requires that the growler:

- Be clearly labeled as containing an alcoholic beverage;
- Provide the name of the manufacturer, the brand, the volume, the percentage of alcohol by volume; and
- Provide the required federal health warning notice for alcoholic beverages.

It also provides that, if a growler that is being refilled has an existing label or other identifying mark of a manufacturer or brand from a prior filling or refilling, that label must be covered sufficiently to indicate the manufacturer and brand of the malt beverage being placed in the container at that refilling.

Section 563.06(4), F.S., requires that the growler must be clean before being filled or refilled.

Section 563.06(5), F.S., prohibits licensees that are authorized to fill or refill growlers from using growlers for the purpose of distribution or sale outside of the manufacturer's premises or vendor's premises, except as authorized under this subsection or s. 561.221(2), F.S.

Severability

Section 9 of the bill provides a severability clause.

As noted in the *Manual for Drafting General Bills* for the Florida Senate, the “[c]ourts do not need a severability section to sever unconstitutional provisions or applications and allow the other provisions or applications to stand.”²⁵ If a severability clause is included in a bill, the standard severability clause provides:

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.²⁶

Effective Date

The bill provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²⁵ *Manual for Drafting General Bills*, Legal Research and Drafting Services, Office of the Secretary of the Senate, The Florida Senate (5th Edition, 1999) at page 50.

²⁶ *Id.*

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 561.01, 561.221, 561.37, 561.5101, 562.34, 563.022, and 563.06.

This bill creates section 561.061 of the Florida Statutes.

This bill creates an undesignated section of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.